

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Telstar Instruments, Inc.

Case No. 07-0233-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

The Director's Decision on the merits of this case ("Decision"), issued on May 13, 2008, resolved all issues in dispute, save for the issue of the appropriate rate of penalties under Labor Code section 1775, which was remanded to the Division of Labor Standards Enforcement ("DLSE") for redetermination.¹ DLSE issued a Redetermination of Penalties Pursuant to Order on Remand ("Redetermination") of which affected subcontractor Telstar Instruments, Inc. ("Telstar") submitted review. The Redetermination assessed penalties under section 1775 at the rate of \$40 per violation, a \$10 reduction from the original assessment of \$50 per violation, and determined that \$9,000.00 in statutory penalties was due. A Hearing on the Merits occurred on January 7, 2009, in San Francisco, California, before Hearing Officer Nathan D. Schmidt. June Johnsen, Telstar's General Manager, appeared for Telstar, and Ramon Yuen-Garcia appeared for DLSE.

The sole issue to be decided is whether DLSE again abused its discretion in assessing section 1775 penalties at the rate of \$40 per violation. In this Decision, the Director finds that Telstar's reason for challenging the Redetermination is flawed. However, DLSE used the wrong standard for determining the amount of the penalties and therefore abused its discretion. Therefore, the Redetermination is again remanded to allow DLSE to use the correct legal analysis.

¹ All further statutory references are to the California Labor Code, unless otherwise indicated.

SUMMARY OF FACTS

The Decision found that Telstar had underpaid the travel and subsistence pay due to its workers on the City of Chowchilla Wastewater Treatment Plant Renovation ("Project") in the amount of \$10,735.03, constituting 225 violations of Telstar's prevailing wage obligations. While these violations justify the imposition of penalties under section 1775, subdivision (a), the Decision found that the assessment of those penalties at the maximum rate of \$50.00 per violation could not be sustained based on the factors cited by DLSE and that DLSE had therefore abused its discretion.

Abuse of discretion existed because:

(1) DLSE incorrectly relied on five prior complaints against Telstar as "a prior record of failing to meet ... prevailing wage obligations," because none of those prior complaints resulted either in a finding of a violations by Telstar or the assessment of penalties. The record established that DLSE had given tacit approval to Telstar's practice of offsetting its travel and subsistence obligations with credit for fuel and vehicle allowances provided to employees on the projects underlying the earlier complaints. While the Decision determined that this practice violated the applicable travel and subsistence provisions, the claimed prior violations were essentially violations of which DLSE approved. There was, therefore, no prior history of violations for section 1775 purposes.

(2) The Decision also found that Telstar's error in relying on DLSE's prior tacit approval was reasonable and constituted a good faith mistake. Further, Telstar attempted to remedy the violation to some degree after the original assessment. In the meantime, DLSE had to amend its assessment twice, each time using a different interpretation of the applicable travel and subsistence provisions, before getting its own interpretation correct. DLSE failed to consider its own difficulty interpreting and applying the provisions when assessing whether mitigation of the penalty amount was warranted.

For these reasons, the Decision vacated the section 1775 penalty assessment because the amount of the penalty for each of the 225 violations was an abuse of discretion. The Decision

remanded to DLSE for redetermination of the penalties “in light of the appropriate factors and the other findings in this Decision.”

DLSE issued the Redetermination on May 22, 2008, reducing the penalty amount to \$40.00 per violation, stating, in pertinent part, that the Redetermination was “based on the facts that the failure to pay travel and subsistence compensation was **not** a good faith mistake” and that “[a]lthough the Director’s Decision found that the evidence does not establish any previous violations, Telstar . . . was aware that the same travel and subsistence provision involved herein, were [*sic*] applicable to some of the other public works projects it had worked on.” (emphasis added.) DLSE believed that it had to find that the violation was not in good faith and the contractor had a history of prior violations in order to issue any penalty due.

DLSE contends that Telstar’s failure to follow the plain language of the applicable travel and subsistence provisions was deliberate and supports the determination of bad faith in the Redetermination. Telstar, on the contrary, argues that the Decision’s finding of a good faith mistake on its part entitles it to a complete waiver of section 1775 penalties.

DISCUSSION

Section 1775, subdivision (a) states in relevant part:

(1) The contractor and any subcontractor . . . **shall**, as a penalty . . . **forfeit** not more than fifty dollars (\$50) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates

(2)(A) The **amount** of the penalty shall be determined by the Labor Commissioner based on consideration of **both** of the following:

(i) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a **good faith mistake** and, if so, the **error was promptly and voluntarily corrected** when brought to the attention of the contractor or subcontractor.

(ii) Whether the contractor or subcontractor has a **prior record** of failing to meet its prevailing wage obligations.

(B)(i) The penalty **may not be less than ten dollars (\$10)** . . . **unless the failure** of the . . . subcontractor to pay the correct rate of per diem wages was a

good faith mistake and, if so, the **error was promptly and voluntarily corrected** when brought to the attention of the . . . subcontractor.

(Emphasis added)

Abuse of discretion is established if the Labor Commissioner “has not proceeded in the manner required by law, the [determination] is not supported by the findings, or the findings are not supported by the evidence.” (Code of Civil Procedure section 1094.5(b).) In reviewing for abuse of discretion, however, the Director is not free to substitute his own judgment “because in [his] own evaluation of the circumstances the punishment appears to be too harsh.” (*Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.) A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage Assessment. (Rule 50(c) [Cal.Code Reg. tit. 8 §17250(c)].)

Both sides treat the question of Telstar’s good faith or lack of good faith as a threshold requirement for any assessment of penalties. Telstar argues that the Decision’s finding of a good faith mistake entitles it to a complete waiver of penalties, while DLSE, on the other hand, argues that it must refer to bad faith in its redetermination to justify the imposition of penalties. Both sides have the section 1775 standard wrong.

Section 1775, subdivision (a)(1), requires penalties upon the failure to pay prevailing wages. The failure to pay prevailing wages **alone** triggers section 1775 penalties. Good faith, prompt correction, and prior history are only considered as factors that mitigate the maximum penalty in a given case.

DLSE’s reassessment was based on the erroneous interpretation that no penalty can be issued where the failure was in good faith and promptly corrected. Not only does DLSE appear to have misinterpreted how to set the penalty amount but it has also expressly ignored the Decision’s findings that Telstar had made a good faith mistake that was only partially corrected. Further, DLSE continues to set the penalty amount based on a history of violations the Director has already found does not exist. Contrary to the Decision’s instructions on remand, DLSE has relied on essentially the same factors that were found to constitute an abuse of discretion in its original penalty assessment as the basis for its Redetermination. Though the testimony and ar-

gument by DLSE makes it clear they simply did not understand how to determine a new penalty amount, the failure to assess penalties using the correct standard constitutes a further abuse of discretion. (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 85.)

To be clear, section 1775 penalties are properly assessed whenever there is a prevailing wage violation subject to Assessment. In setting the amount of each violation, DLSE is guided by the good faith of the contractor, the prompt and voluntary correction, and a history of actual prior violations. Because of the evident error, DLSE is given one more chance to set the penalties correctly, a chance that might not occur in the future.²

Consequently, DLSE has again abused its discretion by using the incorrect legal standard and factual basis to assess penalties under section 1775 at the rate of \$40 per violation. Because the discretion to set penalties under that section is committed to the Labor Commissioner, the Redetermination is vacated and remanded to DLSE for a final redetermination of the penalties. In doing one more redetermination, DLSE shall not claim the failure to pay was not in good faith nor that there is a history of prior violations. Instead, as has already been determined, DLSE shall redetermine the penalty amount based solely on the Telstar's less than complete prompt and voluntary correction of its failure to pay prevailing wages.

FINDINGS

1. Affected subcontractor Telstar Sheet Metal, Inc. filed a timely Request for Review of the Redetermination of Penalties Pursuant to Order on Remand issued by DLSE on remand from the Director's Decision in this matter of May 13, 2008.
2. Telstar's underpayment of travel and subsistence payments owed to its workers on the Project constitutes 225 violations of its prevailing wage obligations that justify the imposition of penalties under section 1775, subdivision (a).
3. Telstar's underpayments were the result of a good faith mistake, and the prior complaints against it that resulted neither in findings of any violation nor the assessment of pen-

² In future cases, the Director may simply dismiss the penalty assessment if the same errors are made on a remand.

alties do not constitute "a prior record of failing to meet ... prevailing wage obligations."

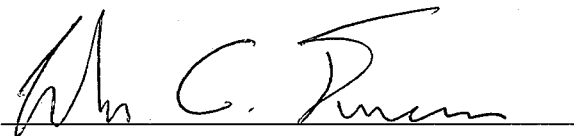
4. DLSE abused its discretion on remand in setting section 1775, subdivision (a) penalties at the rate of \$40 per violation. The assessment of \$9,000.00 in penalties under section 1775, subdivision (a) must therefore be vacated and remanded to DLSE for further redetermination applying the correct standard to the findings in this Decision.

ORDER

The Redetermination of Penalties Pursuant to Order on Remand is vacated and remanded as set forth in the above Findings. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

DLSE shall have 60 days from the date of service of this Decision to issue a new penalty assessment under section 1775, subdivision (a). Should DLSE issue a new penalty assessment, Telstar shall have the right to request review in accordance with section 1742, and may request such review directly with the Hearing Officer, who shall retain jurisdiction for that purpose.

Dated: 2/19/09

A handwritten signature in black ink, appearing to read "John C. Duncan", is written over a horizontal line.

John C. Duncan
Director of Industrial Relations